

***United States Court of Appeals
for the Second Circuit***



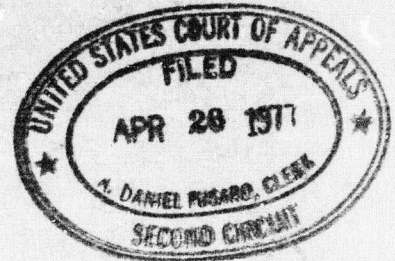
**BRIEF FOR
APPELLEE**

77-7022

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To be argued by
GERALD J. RYAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



MILLICENT LINDEN,

Plaintiff-Appellant,

-against-

SEYMOUR SCHWARTZ, BERNARD WEISS,
Justices of the Civil Court,

Defendants-Appellees,

APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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Statement

This is an appeal from a decision of the United State District Court for the Southern District of New York (Stewart, J.) dated December 21, 1976, dismissing what was construed to be a civil right action pursuant to 42 U.S.C. § 1983 against the defendants herein, both of whom were at

the time, Justices of the Civil Court, City of New York. The plaintiff claimed to be aggrieved by the judicial actions of the two defendants in violation of her constitutional rights.

The plaintiff sought to compel restoration of a case to the calendar in the Civil Court, City of New York and further sought to vacate an order to dismiss. The complaint generally alleged that conduct, by these judges in the exercise of their judicial authority had violated her constitutional rights. The defendant judges have denied such allegations and challenged the validity of service of process in affidavits submitted in support of the motion to dismiss in the lower court.

Prior Proceedings

The suit which underlies this present action was one brought by the now appellant in the Supreme Court, State of New York and subsequently transferred to the Civil Court, City of New York against one Dr. Nathan Novich, a Chiropractor for alleged malpractice as a result of treatment administered to her on September 13, 1973. This case was defended by the insurance carrier of the Doctor and a verdict was rendered in favor of the defendant.

That verdict was appealed to the Appellate Term and affirmed. Permission to appeal to the Appellate Division of the Supreme Court, State of New York, was denied.

Subsequently, a second suit was brought by the same plaintiff against the same defendant arising out of the same incident. This second suit unlike the first, alleged willful, intentional tortuous conduct and not negligence. Under such circumstances, the insurance carrier refused to represent Dr. Novich and so the law firm of Isaacson and Robustelli was retained for such purpose.

In defending Dr. Novich, a Demand for a Bill of Particulars was served upon the plaintiff therein to which there was no effective response. Subsequently, a Demand for a further Bill of Particulars was served upon her to which no effective response was received.

On January 8, 1976, the case appeared in the Personal Appearance Calendar before Judge Weiss, who, upon motion, struck it off said calendar.

Motions by the plaintiff to restore it to the calendar were denied.

Subsequently, a motion for summary judgment was made by the defendant therein, and the case was dismissed by Judge Schackman of the Civil Court, City of New York. That decision was reported on October 27, 1976 in the New York Law Journal as affirmed by the Appellate Term (N.Y.L.J. page 8, column 2). As such, all avenues of motions and appeals were open to the plaintiff to pursue her remedies of which she could avail herself.

Plaintiff moved for permission to appeal to the Appellate Division. The motion was denied and the denial affirmed upon re-argument. Plaintiff thereupon attempted to appeal to the Court of Appeals of the State of New York but the Court would not entertain the motion.

Questions Presented

1. Whether state court judges may be liable for acts committed in the exercise of their judicial functions?
2. Whether the federal judiciary may sit in appellate review of state court judgments rendered in actions over which the federal courts lack subject matter jurisdiction?

POINT I

THE COMPLAINT WAS PROPERLY DIS-
MISSED BY THE DISTRICT COURT.

Appellees Schwartz and Weiss, as Justices of the Civil Court of the New York City, are immune from suit for their judicial acts and acts done in the exercise of their judicial function.

The doctrine of judicial immunity is ancient law and is still valid today. The Supreme Court of the United States long ago declared that:

"Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." Bradley v. Fisher, 13 Wall 335, 351 (1872).

The doctrine of judicial immunity was most recently reaffirmed by the United States Supreme Court as a "settled principle of law" in Pierson v. Ray, 386 U.S. 547 (1966). There the Court said:

"Few doctrines were more solidly established at common law than the immunity of judges from liability

for damages for acts committed within their judicial jurisdiction as this court recognized when it adopted the doctrine in Bradley v. Fisher, 13 Wall 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly and it is not for the protection or benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. (Scott v. Stansfield, L.R. Bex. 220, 223 [1868], quoted in Bradley v. Fisher, supra, 349, 350). It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision making but, to intimidation. Pierson v. Ray, supra, at 544."

The courts of New York have consistently followed the doctrine of judicial immunity. See also Virtu Boteque v. Jobs Lane Candle Shops, 51 A D 2d 813 (1976); Murray v. Brancato, 299 N.Y. 52, 55 (1943); Salomon v. Maheney, 271 A.D. 478 (1st Dept., 1946); Whitshead v. DeAndrea, 60 N.Y.S. 2d 909, 54 Misc 2d 476 (N.Y. Co. 1945); Bienenstock v. McCoy, 88 N.Y.S. 2d 279, 194 Misc. 927 (N.Y. Co., 1949);

Fishbein v. State, 120 N.Y.S. 2d 92 (Ct. Cl. 1953); Seidelman v. State, 110 N.Y.S. 2d 80, 202 Misc. 817 (Ct. Cl. 1952); Reynolds v. Hart, 282 N.Y.S. 2d 909, 54 Misc 2d 476 (Niag. Co., 1967).

The federal judiciary has never hesitated to apply the doctrine of judicial immunity in actions brought against a judge. E.G. Blouin v. Dembitz, 489 F. 2d 488 (2d Cir. 1973); Fanale v. Sheehy, 385 F. 2d 866 (2d Cir. 1967); Edwards v. New York, 314 F. Supp. 469 (S.D.N.Y. 1970); Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y. 1969) affd. 401 U.S. 154 (1971); Stambler v. Dillon, 302 F. Supp. 1250 (S.D.N.Y. 1969); Garfield v. Palmieri, 193 F. Supp. 137 (S.D.N.Y. 1961), affd. 297 F. 2d 526 (2d Cir. 1962), cert. den. 369 U.S. 871 (1962); Garfield v. Palmieri, 193 F. Supp. 582 (E.D.N.Y. 1960), affd. 290 F. 2d 821 (2d Cir. 1961), cert. den. 368 U.S. 827 (1961); Morgan v. Sylvester, 125 F. Supp. 389 (S.D.N.Y. 1954) affd. 220 F. 2d 758 (2d Cir.), cert. den. 350 U.S. 867 reh. den. 350 U.S. 919 (1955).

This doctrine was most recently reenunciated and reaffirmed by the Supreme Court in Imbler v. Pachman, 420 U.S. 945 decided March 2, 1976.

POINT II

RELIEF SOUGHT BY PLAINTIFF CANNOT BE GRANTED

Plaintiff seeks federal court intervention "to compel restoration of her case to the calendar and vacating of an order to dismiss and in general to act as a court of appellate review. The court lacks the authority to grant this relief:

"[W]e hold that under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts." Wallace v. Kern, 481 F. 2d 621 (2d Cir. 1973), cert. den. 414 U.S. 1135 (1974).

The Federal District Court possess no power to sit in appellate review of state court judgments. Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970); Lecci v. Cahn, 493 F. 2d 826 (2d Cir. 1974), United States ex rel. Catalioti v. Mancusi, 309 F. Supp. 1182 (S.D.N.Y. 1970). The federal courts are without

power to issue writs of mandamus to direct state courts or their judicial officers in the performance of their duties. Clark v. Washington, 366 F. 2d 678 (9th Cir. 1966). Moreover,

"the Civil Rights Act was not designed to be used as a substitute for the right of appeal. . .". Coogan v. Cincinnati Bar Ass'n, 431 F. 2d 1209, 1211 (6th Cir. 1970).

To the extent that plaintiff complained of the final judgments of any state court, she is precluded by res judicata from relitigating the issues involved in her state court proceedings, or any issues which might have been presented. E.g., Thistlewaite v. City of New York, 497 F. 2d 339 (2d Cir. 1974), cert. den. 419 U.S. 1093 (1974).

Lastly, the complaint is barren of any suggestion that a substantial federal question was involved in the challenged state court proceedings which involved malpractice suits. Appellant fails to cite one judicial authority for the relief she seeks before this Court.

To ask the federal judiciary to rectify the alleged wrongs committed by judges in presiding over these suits is tantamount to asking the Court to decide these suits over which the Federal Court has no jurisdiction. To do so would be violative of the notion of comity which is a proper respect

for the state functions. Judice v. Vail, ____ U.S. ____
45 USLW 4269, decided by the Supreme Court March 22, 1977.

The general allegation that the state courts' decisions and actions were erroneous is insufficient to state a federal claim. Therefore, no federal question is presented by the complaint, nor could the complaint be construed as alleging the deprivation of any federally secured right.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
DISMISSING THE COMPLAINT SHOULD
BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
May , 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
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Attorney for Defendants-
Appellees

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First Assistant Attorney General

GERALD J. RYAN
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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MAGDALINE SWEENEY , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellees herein. On the 21st day of April , 1977 , she served the annexed upon the following named person :

MILLICENT LINDEN
500 East 74th Street
New York, New York 10021

Plaintiff
~~XXXXXXXXX~~
~~Attorney~~ in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, Plaintiff New York, New York 10047, directed to said ~~Attorney~~ at the address within the State designated by her for that purpose.

Magdaline Sweeney

Sworn to before me this
21st day of April , 1977

Leah D. Brown
Assistant Attorney General
of the State of New York